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No. 02-682

In The
Supreme Court of the United States

VERIZON COMMUNICATIONS, INC.,

Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF UNITED PARCEL SERVICE, INC., HONEYWELL INTERNATIONAL INC., VISA U.S.A. INC., AND EASTMAN KODAK COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

PETER M. KREINDLER
HONEYWELL INTERNATIONAL INC.
101 Columbia Road
Morristown, NJ 07962
(973) 455-5513

Attorney for Amicus Curiae Honeywell International Inc.

STEPHEN THEOHARIS
VISA U.S.A. INC.
123 Mission Street
San Francisco, CA 94105
(415) 932-2100

Attorney for Amicus Curiae Visa U.S.A. Inc.

PATRICK M. SHELLER
EASTMAN KODAK COMPANY
P.O. Box 92988
Rochester, NY 14692

Attorney for Amicus Curiae Eastman Kodak Company

DREW S. DAYS, III
Counsel of Record
W. STEPHEN SMITH
BETH S. BRINKMANN
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

PAUL T. FRIEDMAN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000

Attorneys for Amicus Curiae United Parcel Service, Inc.

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INTEREST OF *AMICI CURIAE*[1]

This case involves important issues in antitrust law – the validity of two theories known as "monopoly leveraging" and the "essential facilities doctrine." The court of appeals erroneously held that respondent's allegations state a claim for relief under Section 2 of the Sherman Act, 15 U.S.C. § 2, based on both theories.

United Parcel Service, Inc. (UPS) provides parcel transportation services throughout the United States and worldwide. UPS competes with a wide array of other carriers, including nationwide carriers, a host of trucking companies, logistics providers, numerous regional and local companies across the country, the United States Postal Service and other postal services around the world.

Honeywell International Inc. (Honeywell) is a diversified technology and manufacturing company that provides customers throughout the United States and worldwide with aerospace products and services, control technologies for buildings, homes and industry, specialty chemicals, fibers, plastics and electronic and advanced materials. Honeywell competes with local, regional, national, and global companies in the many industries that it serves.

Visa U.S.A. Inc. (Visa) is a membership corporation owned by approximately 14,000 banks and other financial institutions located throughout the United States and worldwide. Visa acts as an umbrella organization for its members, providing advertising services to support the Visa brand and technology services to facilitate Visa payment transactions. Visa also regulates and coordinates certain

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk as required under Rule 37.3(a). Pursuant to Rule 37.6, *amici* state that counsel for the parties did not author this brief in whole or in part, and no one other than the *amici*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

aspects of its members' individual programs through rules and by-laws adopted by its board of directors. Under this umbrella structure, Visa's members issue payment cards to consumers and sign up merchants to accept Visa payment products.

Eastman Kodak Company (Kodak) is a global developer, manufacturer and supplier of imaging products and technologies used by consumers, medical professionals, professional photographers, movie and television producers, government customers and commercial businesses. Kodak operates manufacturing plants, research facilities, distribution centers and business offices throughout the United States.

Amici have a strong interest in ensuring that the antitrust laws are applied by the lower courts to promote aggressive competition, not to shield inefficient competitors from the forces of such competition. Because of their nationwide operations, *amici* also have a strong interest in ensuring the uniform application of the antitrust laws throughout the country, so that their operations and business decisions are not subject to different standards in different jurisdictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

A claim for violation of Section 2 of the Sherman Act cannot be stated under the court of appeals' theories of "monopoly leveraging" or denial of access to an "essential facility." Neither of those labels provides an independent basis for a Section 2 claim because neither requires courts to determine whether monopolization through predatory conduct, which is at the heart of Section 2, is alleged in a particular case. The Court should reject the use of those labels and provide clear guidance to the lower courts by reaffirming that Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so" through anticompetitive means.

Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

I. Under the court of appeals' "monopoly leveraging" theory, a firm violates Section 2 if it uses monopoly power in one market to "gain a competitive advantage" in a second market, even if there has been no attempt to monopolize the second market. This holding is inconsistent with the text and purpose of Section 2, as well as this Court's teachings. Section 2 prohibits monopolization and attempted monopolization. Recognizing that the statute "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself," the Court has long held that that statutory prohibition reaches only "predatory or anticompetitive" conduct that creates or enhances monopoly power. *Spectrum Sports*, 506 U.S. at 456-458. Section 2 "leaves untouched a single firm's anti-competitive conduct (short of threatened monopolization)." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 774 (1984).

Consistent with these teachings, the court of appeals' monopoly leveraging theory has been rejected by most other circuits, and criticized by antitrust scholars, as an improper and dangerous extension of Section 2. These courts and commentators correctly recognize that any use of monopoly power to engage in predatory conduct that monopolizes or attempts to monopolize a second market can be reached under traditional Section 2 standards. By creating potential antitrust liability and treble damage exposure for conduct that, far from lessening competition, often benefits consumers by enabling large firms to lower costs and offer new products through vertical integration, the court of appeals' monopoly leveraging theory undermines the purposes of the antitrust laws.

II. The court of appeals' reliance on the "essential facilities doctrine" as an independent basis for Section 2 liability is equally erroneous. Under the lower court's ruling, a firm that controls any business asset that competitors deem "essential" to their success may find itself

subject to a Section 2 action demanding that the firm surrender exclusive control over that asset and permit a rival to use it regardless of whether the firm's refusal to assist its rival is predatory and gives rise to a dangerous threat of monopoly power. This holding, too, is inconsistent with the text and purpose of Section 2 and this Court's teachings: absent predatory conduct that monopolizes or genuinely threatens to monopolize, the Sherman Act "does not restrict the right of a trader or manufacturer * * * freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

Although some lower courts have used the essential facilities doctrine to analyze allegations that a monopolist in one market denied competitors access to an "essential facility" in order to obtain a monopoly in a second market, the court below went far beyond such cases. It held that Section 2 imposes on a lawful monopolist a duty to create a wholesale market in the monopoly product so that other firms may buy that product at a reduced price, and then resell it in competition with the monopolist. That extraordinary rule is flatly inconsistent with long-settled Section 2 jurisprudence, which has never required a lawful monopolist to alter its business in order to create competition in its own market, and would threaten to defeat the Sherman Act's objectives of promoting aggressive competition on the merits. "The successful competitor, having been urged to compete, must not be turned upon when he wins." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

Even in its narrower form, the essential facilities doctrine has been widely criticized by other courts and commentators as being antithetical to the purposes of the antitrust laws. The central message of the Sherman Act is that competition, not cooperation, is the antidote for monopoly. The essential facilities doctrine, however, mandates cooperation among rivals, and thereby diminishes incentives for firms to compete on the merits. The doctrine also requires courts to become regulators –

designing, implementing, and monitoring the terms upon which forced access to a competitor's assets is granted. For these reasons, the competitive problems presented by natural monopolies – the only kinds of assets that might be deemed "essential facilities" – have generally been addressed through statute and administrative action.

This Court has never adopted the essential facilities doctrine. In those few cases in which the Court has found that a monopolist's unilateral refusal to deal with its rivals constitutes predatory conduct that monopolizes or dangerously threatens to monopolize a relevant market, it has employed the traditional Section 2 standards and found them to be adequate to the task. The essential facilities doctrine, like the monopoly leveraging theory, serves only to undermine the purposes of Section 2 and should not be adopted by this Court.

The Court should be particularly skeptical of judicially crafted antitrust rules, like monopoly leveraging or the essential facilities doctrine, that ban a particular type of conduct without determining whether conduct in a particular case is anticompetitive. That is because, as this Court has recognized, "[i]t is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects," *Spectrum Sports*, 506 U.S. at 458-459, and "mistaken inferences" about competitive conduct "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986). Moreover, "single firm activity," which is addressed by Section 2, "is unlike concerted activity covered by § 1 [of the Sherman Act], which 'inherently is fraught with anticompetitive risk.'" *Spectrum Sports*, 506 U.S. at 458 (quoting *Copperweld*, 467 U.S. at 767-769). It is "for these reasons," that Section 2 "makes conduct of a single firm unlawful only

when it actually monopolizes or dangerously threatens to do so." *Spectrum Sports*, 506 U.S. at 458.[2]

I. THE COURT OF APPEALS' MONOPOLY LEVERAGING THEORY EXCEEDS THE SCOPE OF SECTION 2 OF THE SHERMAN ACT

A. Section 2 Is Not Violated When A Firm Uses Its Lawfully Acquired Monopoly Power In One Market To "Gain A Competitive Advantage" In Another Market

1. Section 2 of the Sherman Act makes it unlawful for a person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 2. In *Spectrum Sports v. McQuillan*, 506 U.S. 447 (1993), the Court confirmed that monopolization is at the core of a Section 2 violation. Section 2 "makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so." *Id.* at 459.[3]

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[2] *Amici* address only the merits of the monopoly leveraging and essential facilities rulings in this brief and do not discuss the statutory standing ruling challenged by petitioner, although we agree that that ruling also is erroneous. *See* Pet. 23-26. The questions on the merits can be addressed by the Court without reaching the statutory standing issue. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97 n.2 (1998). We urge the Court to address these merits questions as a threshold matter, in light of the serious adverse consequences for the nation's economy that flow from the court of appeals' erroneous rulings on monopoly leveraging and essential facilities and the fact that lower courts are in need of guidance on these issues.

[3] The Court has defined monopoly power as "the power to control prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). Although the issue of whether a firm possesses such power must be evaluated in the context of a specific market, the Court has found that market shares of 75 percent or more generally give rise to a presumption of monopoly power. *See, e.g.*,

(Continued on following page)

This Court also has held that Section 2 prohibits monopolization only through conduct that is "predatory or anti-competitive" – *i.e.*, conduct that makes economic sense only insofar as it would eliminate competition. *Id.* at 456. And it is clear that "a practice is not 'anticompetitive' simply because it harms competitors. After all, almost all business activity, desirable and undesirable alike, seeks to advance a firm's fortunes at the expense of its competitors. Rather, a practice is 'anticompetitive' only if it harms the competitive process. * * * It harms that process when it obstructs the achievement of competition's basic goals – lower prices, better products, and more efficient production methods." *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 21-22 (1st Cir. 1990), *cert. denied*, 499 U.S. 931 (1991) (citing, *inter alia*, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-489 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

This Court has explained, for example, that monopoly power that is acquired through "growth or development as a consequence of a superior product, business acumen, or historic accident," is not proscribed by the antitrust laws and is lawful. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Such a lawful monopoly, "absent 'predatory' practices to maintain it, will continue only so long as the monopolist sustains a level of efficiency or innovation such that its rivals cannot effectively compete. Because this type of monopolist behaves in an economically efficient manner, the antitrust laws do not stand as an obstacle to its existence." *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 547 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992). That is because the purpose of Section 2 "is not to protect businesses from the working of

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Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 481 (1992) (80 percent share); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (87 percent share); *E.I. du Pont*, 351 U.S. at 391 (75 percent share).

the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself." *Spectrum Sports*, 506 U.S. at 458.

2. The Court's precedents make clear that gaining a competitive advantage in a second market is not sufficient to subject a monopolist to liability under Section 2. In particular, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984), the Court emphasized that Section 2 applies only to unilateral conduct and "leaves untouched a single firm's *anti-competitive conduct* (*short of threatened monopolization*) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability." *Id.* at 774 (emphasis added). The Court explained that "Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur." *Id.* at 768.

Indeed, the zealous pursuit of competitive advantage – by firms large and small – is precisely what the Sherman Act is intended to foster. As this Court has recognized, "[it] is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (citation omitted). Put simply, "[t]he lawful monopolist should be free to compete like everyone else; otherwise the antitrust laws would be holding an umbrella over inefficient competitors." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 375-376 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987); *see also Foremost Pro Color v. Eastman Kodak Co.*, 703 F.2d 534, 543-544 (9th Cir. 1983) ("A monopolist, no less than any other competitor, is permitted and indeed encouraged to compete aggressively on the merits."), *cert. denied*, 465 U.S. 1038 (1984).

3. The court of appeals reached its contrary ruling – that a monopolist violates Section 2 if it "gains a competitive advantage" in a second market – by extending Section 2 under the guise of the "monopoly leveraging" theory. That theory is rooted in that court's earlier opinion in *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), where it had declared that "the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of § 2, even if there has not been an attempt to monopolize the second market." Pet. App. 30a (quoting *Virgin Atl. Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001), which relied on *Berkey Photo*). That decision, in turn, had quoted *dicta* in *United States v. Griffith*, 334 U.S. 100, 107 (1948), suggesting that a monopolist was prohibited not only from using its monopoly power to create another monopoly, but also from using it to "gain a competitive advantage." *Berkey Photo*, 603 F.2d at 275 (quoting *Griffith*, 334 U.S. at 107).

The *holding* of the Court in *Griffith* made clear, however, that liability under Section 1 and Section 2 of the Sherman Act requires a finding that a "restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangement." *Griffith*, 334 U.S. at 105; *id.* at 106 (noting that the question for the Court to resolve was whether the agreements resulted in "restraining or monopolizing of trade within the meaning of the Sherman Act"). Moreover, the Court's subsequent decision in *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 482-483 (1992), confirmed that reading when it quoted the *Griffith* language in describing the elements of a Section 2 claim, but immediately followed the quote with the explanation that, if the defendant there adopted the challenged policies "as part of a scheme of willful acquisition or maintenance of monopoly power, it will have violated § 2." *Ibid.* The Court thereby demonstrated that *Griffith* does not eliminate the need to establish monopolization or attempted monopolization through anticompetitive

means before a firm can be subject to liability under Section 2. The Court's teachings in *Spectrum Sports* and *Copperweld* confirm that fact as well. *See also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

The *Griffith dicta* referring to "gain[ing] a competitive advantage" cannot be read to override those precedents. Indeed, that *dicta* was only one reference in a list of examples of what monopoly power could not be used to do and other examples included "foreclos[ing] competition" and "destroy[ing] a competitor," 334 U.S. at 107, which would be rendered superfluous under respondent's reading. *See also* 3A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772b3, at 180 (2d ed. 2002) ("Areeda & Hovenkamp") (observing that "[i]t would be strange to invest" the *Griffith dicta* about gaining a competitive advantage with great weight because the case "had nothing to do with vertical integration" and "certainly did not discuss either such integration or absolute refusals to deal").

4. Not surprisingly, most lower courts have understood that the *Berkey Photo* monopoly leveraging theory exceeds the scope of Section 2 and have flatly rejected the theory, correctly finding that it is inconsistent with the letter and purpose of the statute. *See Alaska Airlines*, 948 F.2d at 547; *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 203 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993); *Eleven Line, Inc. v. North Tex. State Soccer Ass'n*, 213 F.3d 198, 206 n.16 (5th Cir. 2000). Indeed, the Second Circuit itself had effectively interred the monopoly leveraging theory until the court of appeals' opinion in this case breathed new life into it. *See* pages 11-13, *infra*.

Prominent scholars also have rejected the monopoly leveraging theory. *See, e.g.*, 3A Areeda & Hovenkamp, ¶ 771c, at 173; *see also Association for Intercollegiate Athletics for Women v. NCAA*, 735 F.2d 577, 586 n.14 (D.C. Cir. 1984) (per curiam) (reserving judgment on question in light of "substantial academic criticism cast upon the

leveraging concept") (citing, *e.g.*, Richard A. Posner & Frank H. Easterbrook, *Antitrust* 802-810, 870-871 (2d ed. 1981); Robert Bork, *The Antitrust Paradox* 365-366, 372-375 (1978)). This Court should do likewise and make clear that a mere allegation that a monopolist in one market gained a competitive advantage in a second market cannot state a claim under Section 2. The Court also should clarify that lower courts should not rely on the language in *Griffith* that has been read to suggest the contrary.[4]

B. The Monopoly Leveraging Theory Is Not An Appropriate Means Of Analyzing Section 2 Claims

The history of *Berkey Photo* and its progeny in the Second Circuit demonstrates that the monopoly leveraging theory had not been found, even by that court, to be an appropriate means for analyzing Section 2 claims prior to the instant case. From the very outset, the Second Circuit began to limit its monopoly leveraging theory, apparently realizing that it could not be applied as broadly as initially stated without improperly expanding the boundaries of Section 2.

1. In *Berkey Photo*, the Second Circuit set forth its broad description of the monopoly leveraging theory in an expansive introductory section of the opinion discussing

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[4] The confusion in the lower courts is most recently exemplified by *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3640 (U.S. March 20, 2003) (No. 02-1423), where the court of appeals relied on the "competitive advantage" language in *Griffith* and *Berkey Photo*, but adopted an even broader view, suggesting that three different theories of alleged anti-competitive behavior – the essential facilities doctrine, refusal to deal, and price squeeze – all constitute monopoly leveraging. *See id.* at 1284-1285, 1288. The Eleventh Circuit thereby viewed the essential facilities doctrine as a form of monopoly leveraging, whereas the court below treated the labels as identifying two independent bases for Section 2 liability.

the court's general conception of Section 2 doctrines. *See* 603 F.2d at 275-276. When it came to applying the monopoly leveraging theory to the facts before it, however, the court found the task to be quite difficult. First, the court had to clarify that Section 2 would be violated by a firm gaining a competitive advantage only if the firm did so by "use of the monopoly power it possessed in other segments of the industry," and not if that advantage was gained merely "by virtue of membership in an integrated [monopoly] firm." *Id.* at 291. The court described such prohibited "use of monopoly power" as "an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control." *Ibid.* In a second attempt to describe its test, the court of appeals explained that its analysis rested on "a simple proposition: if an action that gains a firm a competitive advantage is effective because of the company's efficiency, prestige, and innovativeness, and not because of its control over the market, the action is not a use of power." *Id.* at 292.

But the *Berkey Photo* court could not resolve that "simple" issue on the record before it, *ibid.*, notwithstanding that there had been four years of litigation, thousands of exhibits, and a trial that had lasted more than six months, *id.* at 268. The court acknowledged that, even on the facts of that case – where it found that the defendant had a monopoly in more than one market and where the defendant had gained a competitive advantage through the challenged conduct – the advantage "may have been attributable to its innovation of a new system of photography, and not to its monopoly power," and thus would not give rise to Section 2 liability. *Id.* at 292. At the same time, the court was unwilling to "dismiss the possibility" that the defendant's monopoly power was not "at least a partial root of its ability to gain an advantage." *Ibid.* Because the court could not "say with certainty on which side of this demarcation the facts f[e]ll," the court reversed and remanded for a new trial. *Ibid.*

2. Subsequent panels of the Second Circuit failed to provide a fuller explication of how courts are to distinguish between use of a firm's monopoly power and use of its efficiencies and innovativeness to achieve a "competitive advantage." Indeed, several subsequent opinions of that circuit read the monopoly leveraging theory even more narrowly and expressed doubt about its validity. For example, in *Twin Laboratories, Inc. v. Weider Health & Fitness*, 900 F.2d 566 (2d Cir. 1990), the court dismissed *Berkey Photo*'s "competitive advantage" language as *dicta*; characterized that case as involving a tying claim; declared that the quoted language "requires tangible harm to competition" – not just competitors; and found no such evidence in the case before it. *Id.* at 570-571. In *AD/SAT v. Associated Press*, 181 F.3d 216 (2d Cir. 1999), the court directly questioned the "continued scope of monopoly leveraging claims as independent causes of action," in light of *Spectrum Sports*, 506 U.S. at 459; repeated *Twin Laboratories*' analysis of *Berkey Photo*; and found there was inadequate evidence of monopolizing conduct. *Id.* at 230-231.

Even more recently, in *Virgin Atlantic Airways Ltd. v. British Airways*, 257 F.3d 256 (2d Cir. 2001), the Second Circuit observed that it already had questioned the "competitive advantage" theory of monopoly leveraging, *id.* at 272, and explained that the requirement of *Spectrum Sports* for conduct that actually monopolizes or dangerously threatens to do so, "goes beyond 'gaining a competitive advantage' as set out in *Berkey Photo*." *Ibid.* The court determined that it was "unnecessary for [it] to decide, as a matter of law, the viability of a claim for monopoly leveraging as described in *Berkey Photo*," however, because the plaintiff lacked the requisite proof in that case. *Ibid.*

Accordingly, the experience of the Second Circuit in dealing with its *Berkey Photo* precedent does not commend adoption of that theory as an appropriate means of analyzing Section 2 claims. The court's attempts to narrow the theory by requiring tangible harm to competition and its

suggestion that a requirement of monopolization or dangerous threat thereof may be required amply demonstrate that the flaw in the theory is that it exceeds the scope of Section 2. Thus, as the Ninth Circuit observed when it, like the Third and Fifth Circuits, rejected the monopoly leveraging doctrine as an independent theory of liability: "If there is a dangerous probability that a monopoly will be created by leveraging conduct, then the conduct will be reached under the [traditional] doctrine of attempted monopoly" pursuant to Section 2. *Alaska Airlines*, 948 F.2d at 549; *see also Fineman*, 980 F.2d at 203; *Eleven Line, Inc.*, 213 F.3d at 206 n.16.

C. The Monopoly Leveraging Theory Undermines The Purposes Of The Sherman Act

1. The court of appeals' monopoly leveraging theory discourages monopolists and other large firms from entering new markets and engaging in conduct that would result in lower prices, better products, and more efficient production. For example, firms often vertically integrate from one market into a second market in order to lower their costs, and therefore their prices, and to provide integrated products that are more valuable to the consumer. *See, e.g.*, Posner & Easterbrook, *supra*, at 869 ("vertical integration is a potential source of substantial cost savings"). Courts and commentators have recognized that vertical integration by a monopolist, even if it drives competitors out of business, may be perfectly lawful because it "could (by lowering costs) lower prices, or, in any event, save economic resources." *Town of Concord*, 915 F.2d at 24 (citing 3 Phillip Areeda & Donald F. Turner, *Antitrust Law* ¶ 725d, at 201 (1978), and Bork, *supra*, at 243); *see also* 3A Areeda & Hovenkamp ¶¶ 757a-757c, at 23-27.

Under the court of appeals' monopoly leveraging theory, however, any such effort at vertical integration can become the basis for an antitrust claim on the ground that it harms competitors by giving the integrated firm a

"competitive advantage" (regardless of whether it results in the acquisition or enhancement of monopoly power in the second market through predatory conduct). Firms that are potentially subject to such claims will be deterred from seeking the efficiencies of vertical integration, knowing that the reward for such conduct may be lengthy and costly antitrust litigation and, potentially, treble damages and a court order prohibiting them from making use of those efficiencies to compete in the second market. *See* Richard A. Posner, *Antitrust Law* 224 (2d ed. 2001) ("Were vertical integration deemed a suspect practice under the antitrust laws because of its potential exclusionary effect, all commercial activity would be placed under a cloud as the courts busied themselves redrawing the boundaries of firms, even though the normal motivation for and consequence of vertical integration are merely to reduce the transaction costs involved in coordinating production by means of contracts with other firms.") (footnote omitted).

2. The court of appeals' monopoly leveraging theory does nothing to benefit consumers. As courts and commentators have pointed out, "the extension of monopoly power from one to two levels does not *necessarily*, nor in an *obvious* way, give a firm added power to raise prices." *Town of Concord*, 915 F.2d at 23. That is because "there is but one optimal monopoly profit to be gained from the sale of an end-product." 3A Areeda & Hovenkamp ¶ 756b2, at 13; *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 36 (1984) (O'Connor, J., concurring in the judgment) (noting that that economic theory is "widely accepted" and "easily demonstrated") (citing Phillip Areeda, *Antitrust Analysis* 735 (3d ed. 1981), and Bork, *supra*, at 372-374). *See also* Bork, *supra*, at 229 ("vertically related monopolies can take only one monopoly profit"); Posner & Easterbrook, *supra*, at 870 ("There is only one monopoly profit to be made in a chain of production"); *Town of Concord*, 915 F.2d at 21, 32-33 (App. A) (explaining this "counterintuitive" result). And to the extent that conduct expanding a monopoly from one market to a second market does harm consumers by expanding the

firm's monopoly power, such conduct is actionable under the traditional rubric of Section 2.

II. THE ESSENTIAL FACILITIES DOCTRINE IS NOT AN INDEPENDENT BASIS FOR LIABILITY UNDER SECTION 2 OF THE SHERMAN ACT

A. The Essential Facilities Doctrine Extends To Conduct Beyond The Reach Of Section 2

1. The court of appeals purported to recognize that a monopolist does not have a duty to cooperate with its competitors, Pet. App. 28a, but then concluded that "a monopolist has a duty to provide competitors with reasonable access to 'essential facilities,' facilities under the monopolist's control and without which one cannot effectively compete in a given market." *Id.* at 29a. The court went on to hold that respondent stated a Section 2 claim under that "essential facilities doctrine" by alleging that petitioner failed to provide its competitor (the company that provided respondent local telephone service) reasonable access to its "local loop" which, according to respondent, was essential to competing in the market for local telephone service and would be prohibitively expensive for others to create independently. *Ibid.*

This Court has indicated, however, that, "[i]n the absence of any purpose to create or maintain a monopoly, the [Sherman Act] does not restrict the long recognized right of a trader or manufacturer * * * freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919); *see also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). The court of appeals' use of an imprecise label therefore led it to erroneously hold that any allegations that satisfy its "essential facilities" doctrine provide an independent basis for a Section 2 claim.

2. One of the reasons the court of appeals may have been led to apply its essential facilities doctrine in this case is because of the duties that the Telecommunications Act of 1996 (Telecommunications Act), Pub. L. No. 104-104, 110 Stat. 56, places on petitioner and other local exchange carriers. For example, that law requires local exchange carriers to provide any requesting telecommunications carrier "nondiscriminatory access to network elements on an unbundled basis * * * on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the [parties' interconnection] agreement and the requirements of" 47 U.S.C. §§ 251, 252. 47 U.S.C. § 251(c)(3). The Telecommunications Act contains its own comprehensive remedial scheme. The governing interconnection agreement in this case provided for an exclusive dispute resolution procedure to govern any disputes between petitioner and respondent's local telephone service provider that arose out of the agreement. Pet. App. 5a. Moreover, the FCC maintains regulatory authority over certain local exchange carriers, such as petitioner. *See* 47 U.S.C. § 257(d)(6). Indeed, the very conduct challenged by respondent in this case led to an FCC consent decree under which petitioner agreed to pay $3 million to the United States and $10 million to respondent's local telephone service provider and other similarly situated carriers. Pet. App. 5a.

But such an obligation imposed by a regulatory scheme cannot support a claim for violation of Section 2 of the Sherman Act. Before enactment of the Telecommunications Act, petitioner had no duty under the antitrust laws to enable firms to compete against it in the provision of local telephone service by granting them access to its wiring and telecommunications network. And Congress expressly declined to expand the scope of the antitrust laws by virtue of the Telecommunications Act. *See* Pub. L. No. 104-104, § 601(b)(1), 110 Stat. 56, 143 (providing that nothing in the Act "shall be construed to modify, impair or supersede the applicability of any of the antitrust laws");

Cavalier Telephone, LLC v. Verizon Va., Inc., No. 02-1337, slip op. at 19 (4th Cir. May 20, 2003). The court of appeals apparently recognized the inappropriateness of relying on a duty from a regulatory scheme to create a novel duty under the antitrust laws and found, instead, that petitioner's duty to provide its competitor access to its facilities arose from Section 2 of the Sherman Act. *Cf.* Pet. App. 29a (acknowledging that alleged conduct might also violate the Telecommunications Act).

The court of appeals failed, however, to articulate the elements of the Section 2 essential facilities claim it recognized. It simply cited a decision from another circuit, *see* Pet. App. 29a (citing *Southern Pac. Communications Co. v. AT&T*, 740 F.2d 980, 1009 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985)), and quoted it as describing *United States v. Terminal Railroad Ass'n*, 224 U.S. 383, 411 (1912), to require a monopolist "to provide competitors with reasonable access to 'essential facilities,'" upon "just and reasonable terms." But *Terminal Railroad* did not use the "essential facilities" terminology and did not adopt the doctrine. Indeed, that case did not even involve single-firm conduct. Rather, it involved the very different situation of joint action by multiple rivals and the question the Court addressed was whether their conduct "resulted in a combination which is in restraint of trade" in violation of Sections 1 and 2 of the Sherman Act. *See Terminal R.R.*, 224 U.S. at 394. The admission of another rival to the joint venture was imposed as a remedy. *Cf. id.* at 409-410 (discussing a finding of attempted monopolization in course of remedy analysis).

3. This Court "has never adopted" the essential facilities doctrine. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 428 (1999) (Breyer, J., concurring in part and dissenting in part). The Court has declined to address the possible applicability of the doctrine even when the court below relied on it. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 611 n.44 (1985).

Various lower courts, however, have described the doctrine as requiring a firm with monopoly power in one

market to share its assets with competitors in a related non-monopoly market in certain circumstances. The Seventh Circuit in *MCI Communications Corp. v. AT&T*, 708 F.2d 1081 (1983), *cert. denied*, 464 U.S. 891 (1983), articulated a four-part test for determining when the doctrine should be applied and other courts have purported to adopt the test.[5] Those decisions should be rejected.

The antitrust laws rest upon the well-established economic principle that aggressive competition among rivals, not the forced sharing of competitive assets, will maximize consumer welfare. *See United States v. Citizens & Southern Nat'l Bank*, 422 U.S. 86, 116 (1975). Because the essential facilities doctrine suggests that the antidote to monopoly is cooperation, not competition, it is inherently dangerous and should not be adopted by this Court.

The essential facilities doctrine has been widely criticized by both courts and commentators, including by subsequent decisions of the Seventh Circuit. Judge Posner has emphasized, for example, that "[c]onsumers are not better off if the natural monopolist is forced to share some of his profits with potential competitors." *Blue Cross & Blue Shield United of Wisc. v. Marshfield Clinic*, 65 F.3d 1406, 1413 (7th Cir. 1995), *cert. denied*, 516 U.S. 1184 (1996). Rather, it is in the interest of consumers to permit a lawful monopolist to reap the full economic benefit of its position, because those supra-competitive rewards will encourage potential competitors to compete aggressively to dislodge the monopolist. *See ibid.* Judge Posner also has pointed out that other noted antitrust scholars have criticized "the decisions in the essential-facilities line" as "having nothing to do with the purposes of the antitrust law." *See id.* at 1412

[5] The *MCI* test requires the following elements: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI*, 708 F.2d at 1132-1133.

(citing Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition And Its Practice* § 7.7 (1994); Phillip Areeda, *Essential Facilities: An Epithet In Need Of Limiting Principles*, 58 Antitrust L.J. 841 (1990); Scott D. Makar, *The Essential Facility Doctrine and the Health Care Industry*, 21 Fla. St. U. L. Rev. 913 (1994)).

Some lower courts have attempted to limit the essential facilities doctrine, apparently in an effort to bring it closer to the text and purpose of Section 2. For example, some courts have applied the doctrine to instances where, absent access to the monopolist's facilities, a competitor cannot compete at all in a secondary market, but have not allowed an essential facilities claim to be based on a mere difficulty in competing on terms that are less favorable than the monopolist's own access to its facilities. *See Alaska Airlines*, 948 F.2d at 545-546; *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 648-649 (10th Cir.), *cert. denied*, 506 U.S. 831 (1992), *overruled in part on other grounds by Systemcare, Inc. v. Wang Lab. Corp.*, 117 F.3d 1137 (10th Cir. 1997) (en banc); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 544-545 (4th Cir.), *cert. denied*, 502 U.S. 814 (1991). Other courts, including the Seventh Circuit, appear to view a facility as "essential" only if it cannot be duplicated because the monopoly is a natural monopoly, is legally protected from competition, or is publicly subsidized. *See, e.g., MCI*, 708 F.2d at 1133; *Marshfield Clinic*, 65 F.3d at 1412; 3A Areeda & Hovenkamp ¶ 773b, at 202. Those attempts to cabin the doctrine have not, however, succeeded in creating a manageable legal standard justified by a coherent economic theory so as to warrant adoption by this Court.[6]

[6] Some commentators similarly have suggested that the essential facilities doctrine, if it were to be recognized at all, should be limited to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." *Twin Labs.*, 900 F.2d at

(Continued on following page)

The application of the doctrine by the court below compounded the problem by striking out in the other direction and broadening the essential facilities doctrine beyond what any other court had done. In holding that petitioner is obligated, not merely under the Telecommunications Act, but also under Section 2, to provide competitors with access to its local loop, the court of appeals' ruling would require a firm to create a wholesale market to sell its product or service to a rival at a discount so that that rival can then turn around and resell the product or service at retail in direct competition with the firm. No other court has held that a lawful monopolist must provide a competitor access to its facilities in order to create competition in the monopoly market. *See, e.g., Illinois ex rel. Burris v. Panhandle E. Pipe Line Co.*, 935 F.2d 1464, 1484 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) ("penaliz[ing] the monopolist for refusing to surrender a lawfully obtained monopoly" is "a result courts have long foresworn").

That is what the Seventh and Fourth Circuits have correctly recognized is not required by the antitrust laws. *See Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 398 (7th Cir. 2000) ("even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor") (quoting *Aspen Skiing*, 472 U.S. at 600); *Cavalier Tel., LLC v. Verizon Va., Inc.*, No. 02-1337, slip op. at 18 (4th Cir. May 20, 2003); *see also MCI*, 708 F.2d at 1133, 1148-1149 (requiring AT&T to provide MCI access to its local telephone network so as to enable MCI to compete

569 (quoting Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 736.2, at 680-681 (1988 Supp.)); *see also* 3A Areeda & Hovenkamp ¶ 771c, at 173 ("only three situations in which an essential facilities doctrine is even arguably appropriate"). These commentators also, however, recognize the heavy costs that the doctrine would impose and the minimal benefits it would yield and ultimately conclude that the doctrine should be rejected. *See ibid.*

in the long-distance market (not in the local telephone market), but denying MCI's claim for access to AT&T's long-distance network even though such access also would have improved MCI's ability to compete in long-distance market).

Moreover, the required creation of a wholesale market would mean, in essence, that a firm would be made to alter the inherent nature of its business. Such a requirement has been correctly rejected by other courts as not mandated by Section 2. *See Laurel Sand & Gravel*, 924 F.2d at 545 (finding no liability under essential facilities doctrine because whether it is feasible for monopolist to provide access "must be analyzed not in terms of all the possibilities" of the firm, but in the context of its normal course of business).

Prominent scholars have declared that "the essential facility doctrine is both harmful and unnecessary and should be abandoned." 3A Areeda & Hovenkamp ¶ 771c, at 173. This Court should conclude likewise and decline to adopt the doctrine.

B. Ample Legal Means Already Exist To Redress Any Unlawful Anticompetitive Conduct That Results From Control Of A Particular Facility

There is no cause for the Court to adopt the essential facilities doctrine in any form because allegations of truly anticompetitive conduct, including conduct that involves the control of a particular facility, can be adequately redressed under traditional Section 2 standards or through regulation.

1. This Court's decisions in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), illustrate well the use of traditional Section 2 analysis in the context of a unilateral refusal to deal.

As noted above, the *Aspen Skiing* Court explicitly withheld judgment on the applicability of the essential

facilities doctrine, notwithstanding the court of appeals' reliance on it in that case. *See* 472 U.S. at 599, 611 n.44. Instead, the Court addressed whether the record evidence supported the jury finding that the defendant's refusal to deal constituted predatory conduct to maintain monopoly power under the traditional Section 2 standards.

Aspen Skiing met that criterion because it involved a company that not only discontinued a longstanding practice of joint-ticket packages (notwithstanding that the practice had benefited it economically in the past), but the company also then refused to sell its own tickets to the competitor "at the tour operator's discount or at retail," *id.* at 593, and refused to accept full-price coupons from the competitor's customers (guaranteed by funds on deposit at a local bank) in exchange for its daily tickets, *id.* at 594. That combination of actions made it impossible for the competitor to market its own joint-ticket. *Id.* at 607-608. The company's conduct thereby eliminated from the market a product that was preferred by consumers and "consumers were adversely affected by the elimination" of the product. *Id.* at 606. Also, the company engaged in a national advertising campaign that "strongly implied" a falsehood that its mountains were the only ski mountains in the area. *Id.* at 593. The company thus attempted to expand its monopoly power through predatory conduct by excluding competition "on some basis other than efficiency." *Id.* at 605.

Similarly, the Court in *Otter Tail* did not invoke an "essential facilities" doctrine, but rather affirmed the district court's straightforward application of Section 2 to find that the defendant, an electric utility company, had "attempted to monopolize and had monopolized the retail distribution of electric power in its service area in violation of § 2 of the Sherman Act." 410 U.S. at 368. The Court did not rely solely on the fact that the defendant refused to sell its energy at wholesale to potential rivals (municipal power systems that were former retail customers). The Court also relied on the fact that the defendant refused to

wheel (carry) power from other suppliers of wholesale energy who were willing to supply it to the potential rivals but needed such wheeling by the defendant to reach the rivals. *Id.* at 377. The Court confirmed the district court's determination that the defendant thereby used its "strategic dominance * * * to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." *Id.* at 377 (quoting *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 60 (D. Minn. 1971)).

The *Otter Tail* Court emphasized that such use of monopoly power "to destroy threatened competition" constitutes attempted monopolization in violation of Section 2. 410 U.S. at 377 (citation omitted). The Court expressly found that the record supported the district court's finding that the defendant's "refusals to sell at wholesale or to wheel were solely to prevent municipal power systems from eroding its monopolistic position." *Id.* at 378.

Both *Aspen Skiing* and *Otter Tail* therefore teach that traditional Section 2 standards are adequate to impose liability to the extent unilateral denial of access maintains or enlarges monopoly power through predatory or exclusionary means (*i.e.*, if the conduct makes economic sense only insofar as it would eliminate competition). *See also* Br. U.S. & FTC Supporting Pet. Cert. at 12, 13.[7]

[7] Although the Seventh Circuit applied the essential facilities doctrine in *MCI*, *see* page 19 & note 5, *supra*, that court also relied heavily on *Otter Tail* as "an analogy" and described that case not as applying an "essential facilities" label, but as focusing on the traditional Section 2 concern that a defendant had used its monopoly power "to further a monopoly in another market." 708 F.2d at 1133. Such traditional Section 2 analysis also would have been adequate to resolve the problem before the court in *MCI*. *See* 3A Areeda & Hovenkamp ¶ 771c, at 173 ("In virtually every instance where competitive problems can be effectively addressed by forcing the monopolist to deal, traditional doctrine of refusal to deal is sufficient to the task.").

2. Regulation is an even more typical means of addressing concerns about access to a lawful monopolist's facilities. In fact, it is generally the case that unilateral refusals to deal by lawful monopolists are thought to be best addressed through "[g]overnment regulation, as opposed to treble damages and criminal liability under the Sherman Act." *Alaska Airlines*, 948 F.2d at 548 (citing William K. Jones, *Government Price Controls and Inflation: A Prognosis Based on the Impact of Controls in the Regulated Industries*, 65 Cornell L. Rev. 303, 304 (1980)). That is because a true essential facility is, by definition, a natural monopoly,[8] and the competitive problems posed by a natural monopoly cannot be remedied by market forces (except, perhaps, in the very long run). Regulation, therefore, is the only practical means of forcing a natural monopolist to expand market output and reduce market price. In these circumstances, application of traditional Section 2 unilateral refusal to deal analysis is necessary only as a means to capture conduct that cannot be redressed through regulatory remedies. Commentators have explained that that was the case in *Otter Tail*, where the federal regulatory agency "lacked the authority to order wheeling of wholesale power, and the Court used antitrust to fill this regulatory vacuum." 3A Areeda & Hovenkamp ¶ 772b3, at 181 (footnote omitted).

Regulation also is a better means for resolving problems of access to natural monopolies because, otherwise, courts (instead of regulators) will be called upon to make judgments about exactly which assets a firm must be

[8] A natural monopoly arises in a market in which consumer demand will support only one efficiently-scaled firm. In such a market, the costs of production are significantly lower with a single producer, and that producer can earn larger profits by charging less than would be charged by several less efficient firms. *See Alaska Airlines*, 948 F.2d at 548 (citing 3 Areeda & Turner ¶ 621a, at 47-48 (1978)); *see also* 3 Areeda & Hovenkamp ¶ 658b, at 121.

forced to share with a competitor and the terms, including price, on which such sharing must take place. One of the principal problems with courts setting prices is that "[t]he reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow." *Town of Concord*, 915 F.2d at 25 (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927)). Therefore, lower courts would be required to continue to monitor and enforce such orders. "Such a solution is nothing less than price regulation of the kind undertaken by regulatory agencies – something for which both the federal courts and the antitrust litigation process are extremely ill-suited." 3A Areeda & Hovenkamp ¶ 771b, at 172.

In short, it is not for the courts to serve the role of legislature or regulatory commission. If economic interests or public demand calls for particular facilities to be shared, the legislature can mandate such sharing either directly or through the adoption of a regulatory scheme to be overseen by an agency equipped to determine the appropriate prices to be charged and the terms of access to the facility. Congress and state and local legislatures can and have enacted legislation to address such issues, including the Telecommunications Act which imposes particular duties on petitioner and required petitioner to remedy an alleged violation of the statute.

C. The Essential Facilities Doctrine Runs Contrary To The Aims Of The Sherman Act By Requiring Competitors To Share Resources

1. The essential facilities doctrine discourages competition by all firms – large and small – by creating the prospect of forced sharing of business assets. Indeed, by requiring firms to cooperate with one another through the sharing of resources and common costs, the doctrine promotes precisely the kind of coordination between firms that is the concern of Section 1 of the Sherman Act. *See, e.g., Copperweld*, 467 U.S. at 767-768.

The essential facilities doctrine serves to deter large firms from engaging in procompetitive conduct that benefits consumers. First, companies will not compete aggressively to build efficiently-scaled businesses if the cost of success is that they must share the fruits of their labors with rivals. 3A Areeda & Hovenkamp ¶ 773e, at 212 ("the [essential] facility, which is admittedly desirable, might not have come into existence had a sharing requirement existed when the investment was made"). In addition, firms potentially subject to an "essential facilities" claim will be reluctant to "undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement." *AT&T Corp.*, 525 U.S. at 429 (Breyer, J., concurring in part and dissenting in part). Under the court of appeals' rule, rivals who do not bear any of the costs or risks of developing innovative ideas, products or businesses will be able to share in those investments.

Second, the essential facilities doctrine will discourage firms that control an arguably "essential" facility from vertically integrating into a related market – even if such integration would result in lower costs and prices to consumers. A firm that does so would immediately subject itself to attack by competitors in the related market, who would demand access to the firm's "essential" assets and resources. These effects will be magnified if the Court endorses the court of appeals' unprecedented conclusion that Section 2 may be invoked to force a firm that competes in only one market to create a separate wholesale market for its product or service so that would-be rivals may compete with it on equal terms. Under that rule, any company that develops an innovative or successful product or service would be subject to an essential facilities claim.

Competitive conduct by smaller firms also is discouraged by the essential facilities doctrine because smaller rivals will have little incentive to compete aggressively to

develop products and services that may displace an incumbent monopolist if they can invoke the Sherman Act to gain access to the monopolist's assets. 3A Areeda & Hovenkamp ¶ 771b, at 172 ("the right to share a monopoly discourages firms from developing their own alternative inputs").[9]

2. If this Court were to adopt the essential facilities doctrine as an independent Section 2 standard and authorize lower courts to force competitors to share resources, the adverse effects on economic efficiency would permeate every sector of the economy. As the courts of appeals have demonstrated, it is difficult to define and implement uniform standards for the essential facilities doctrine. Such uncertainty regarding the scope of the doctrine already has led to a proliferation of cases with varying and conflicting constructions of the doctrine. That would undoubtedly continue, especially if, as the court of appeals here held, those cases can be brought by class action plaintiffs seeking treble damages.

Since this decision, more than two dozen additional cases have been filed against incumbent local telephone companies. *See* Pet. 28 n.22. Plaintiff class actions are now being pursued based on similar theories against firms in other industries as well. *See, e.g., Yankees Ent'mt & Sports Network, LLC v. Cablevision Sys. Corp.*, 224 F. Supp. 2d

[9] The essential facilities doctrine does not benefit consumers by reducing price. See p. 19, *supra*. Commentators explain that, for a variety of reasons, "when [an essential facility] is shared; ordinarily, price and output are the same as they were when one monopolist used the input alone." 3A Areeda & Hovenkamp ¶ 771b, at 171-172. For example, so long as a monopolist is able to charge a monopoly price for access to its facilities, it will prevent rivals from achieving cost savings, expanding output, or lowering price. Even if a court acts as a regulator and requires the monopolist to charge a lower price for access, there is no assurance that this will result in lower prices to the consumer because the firms sharing the monopoly asset may simply maintain the monopoly price and share the monopoly profits. *Ibid.*

657, 671-673 & n.12, 674-675 (S.D.N.Y. 2002) (expressly relying on decision by court of appeals in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that a cable operator refused to grant a regional sports programmer "carriage on its system on nondiscriminatory terms such as those terms and conditions available to its affiliates," *id.* at 664, which caused the latter to have fewer viewers and less revenue); *In re EVIC Class Action Litig.*, No. 02-Civ-2703, 2002 WL 1766554, at *12-14 (S.D.N.Y. July 30, 2002) (expressly relying on decision by court of appeals in the instant case to deny motion to dismiss a Section 2 claim under monopoly leveraging theory and essential facilities doctrine, based on allegations that UPS offered package insurance to its customers, but denied other potential package insurers access to the shipping forms and software that UPS provides to its customers).

The court of appeals' construction of Section 2 will "chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.*, 475 U.S. at 594. The Court should reject that construction and confirm, instead, that Section 2 is meant to foster aggressive competition on the merits by prohibiting only predatory or exclusionary conduct that monopolizes or attempts to monopolize a relevant market. *See Spectrum Sports*, 506 U.S. at 458-459.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

PETER M. KREINDLER
HONEYWELL INTERNATIONAL INC.
101 Columbia Road
Morristown, NJ 07962
(973) 455-5513

Attorney for Amicus Curiae Honeywell International Inc.

STEPHEN THEOHARIS
VISA U.S.A. INC.
123 Mission Street
San Francisco, CA 94105
(415) 932-2100

Attorney for Amicus Curiae Visa U.S.A. Inc.

PATRICK M. SHELLER
EASTMAN KODAK COMPANY
P.O. Box 92988
Rochester, NY 14692

Attorney for Amicus Curiae Eastman Kodak Company

DREW S. DAYS, III
Counsel of Record
W. STEPHEN SMITH
BETH S. BRINKMANN
MORRISON & FOERSTER LLP
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 887-1500

PAUL T. FRIEDMAN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105
(415) 268-7000

Attorneys for Amicus Curiae United Parcel Service, Inc.

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